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SUPREME COURT, U.S.

No. 79-1356

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

KATHY SUE JOHNSON, etc. et al., and
DARCEL MILTON, etc. et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,
et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

OPPOSITION TO SUGGESTION OF MOOTNESS

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October 10, 1980

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	2
THIS CASE IS NOT MOOT	2
CONCLUSION	6

TABLE OF AUTHORITIES

Cases:

Bell v. Wolfish, 441 U.S. 520, 550 n. 31 (1979) . . . 7

Bond v. Floyd, 385 U.S. 116, 128 n.4 (1966) 4

Deposit Guarantee Nat'l Bank v. Roper, 48 U.S.L.W. 4279 (S.Ct., March 19, 1980). 4

Harman v. Forssenius, 380 U.S. 528, 534-35 (1968) . . . 6

Lake Carriers' Ass'n v. MacMullen, 406 U.S. 498, 511 (1972) . . . 6

Powell v. McCormack, 395 U.S. 486, 499-500 (1969) . . . 4

Rescue Army v. Municipal Court, 331 U.S. 549, 575-78 (1947) . . . 6

Sanks v. Georgia, 401 U.S. 144 (1971) . . . 7

United States v. Phosphate Export Ass'n, 393 U.S. 199, 203 (1968) . . . 6

United States v. W.T. Grant Co. 345 U.S. 629, 633 (1953) . . . 4, 5

University of California Regents v. Bakke, 438 U.S. 265 (1978) . . . 3

Other:

5 Wright & Miller, Federal Practice & Procedure, §1255, at 250-54 . . . 3

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INTRODUCTION

Petitioners strongly oppose the suggestion of mootness advanced by respondent Board of Education.

This case involves the lawfulness of racial quota plans adopted by respondents at two of 61 of Chicago's

general high schools. The Board now contends that this case is moot because it has decided to abandon the quota plan as of the end of the 1981 school year, over seven months from now.

ARGUMENT

THIS CASE IS NOT MOOT

For several reasons, this case is not rendered moot by the Board's claim that it will voluntarily cease its unlawful conduct.

First, it is noteworthy that the quotas are not to be abandoned until the close of the school year. There is no reason that this case cannot be fully briefed, argued and adjudicated in the next seven months, so that the challenged quotas will be in effect at the time of decision and subject to injunctive relief. Thus, irrespective of whether the case may be moot in the next school year, it is not moot at this time.

Even more important, the Board's professed intention to abandon the quotas in the future does not moot the claims of individual petitioners, who have been unlawfully excluded from Gage Park and Morgan Park High Schools in the past. No provision has been made by the Board for the

readmission of the thousands of black students, including petitioners, excluded from those schools. Rather, under the terms of the quota plan, excluded children relegated to alternative schools "are to be considered members of that [alternative] school's regular student body and, therefore, are not unilaterally transferable." (J.A. 26).

Thus, if the quota plans are declared unlawful, petitioners and others similarly situated will be entitled to readmission to Gage Park and Morgan Park High Schools. Cf. University of California Regents v. Bakke, 438 U.S. 265 (1978)(student excluded by unlawful quota entitled to readmission to school). This relief is not being afforded by the Board. Plainly, petitioners have a continuing concrete interest in the controversy because it is only through this litigation that they can be readmitted to their neighborhood schools.

In addition, petitioners have a continuing claim for money damages if their exclusion on account of race was unlawful. Contrary to respondent's statement (br. at 3n.) that petitioners sought injunctive relief only, the Complaint included a prayer for "such other and further relief...as the Court may deem just and proper," (R.1 at 11), a phrase intended to include a prayer for damages. Such a prayer is

sufficient under the Federal Rules of Civil Procedure to support a claim for monetary relief, see 5 Wright & Miller, Federal Practice & Procedure §1255, at 250-54. This Court's decision as to the lawfulness of the Board's revised quota plans (which provided excluded children with bus transportation to alternative schools) will be determinative as to petitioners' entitlement to damages. The existence of this damage remedy precludes any claim of mootness. E.g, Powell v. McCormack, 395 U.S. 486, 499-500 (1969); Bond v. Floyd, 385 U.S. 116, 128 n.4 (1966). In the same vein, petitioners' ability to obtain an award of attorneys fees if their position is vindicated prevents any mootness which might otherwise exist. See Deposit Guarantee National Bank v. Roper, 48 U.S.L.W. 4279 (S.Ct., March 19, 1980)(offer of judgment to class representative does not make case moot where the representative would have a claim against other class members for attorneys fees and costs).

Even apart from these considerations, this case is not moot because the Board is "free to return to [its] old ways." United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953). The very vague provisions in the Consent Decree provide no assurance that petitioners will not again be the victims of unlawful discrimination. The Decree, for example, has no definition of "desegregation" (§2.1), no criteria for what is "practicable" (§§2.1, 2.3), and no definition of

under what circumstances a burden on one racial group is deemed to have been imposed "arbitrarily." (§2.4). The Consent Decree allows, but does not mandate, the Board to adopt mandatory reassignment measures (§4). It also provides that "stably integrated schools"--which are not defined--can be excluded from the desegregation plan. (§5.2).

Thus, nothing in the Consent Order precludes the Board from implementing the precise situation now present--that petitioners are the only children in Chicago forcibly excluded from their neighborhood schools on account of their race. And this danger is particularly severe because the imposition of burdens exclusively on blacks through quotas has been already upheld by the Court of Appeals for the Circuit in which the Consent Decree has been entered. In fact, the other party to the Consent Decree -- the Department of Justice -- has already concluded that the Decree does not preclude the racial quotas imposed by the Board. See Letter of Solicitor General to this Court, September 30, 1980 (Consent Decree does not moot this litigation). Particularly given the history of this litigation, Chicago's pattern of general resistance to desegregation efforts, and the vagueness of the Consent Decree, the Board has not met the stringent test that there be "no reasonable expectation that the wrong will be repeated." United States v. W.T. Grant Co., supra, 345 U.S. at 633:

> "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. But here we have only [respondent's] own statement.... Such a statement, standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have held rests in [respondent's] shoes."

United States v. Phosphate Export Ass'n, 393 U.S. 199, 203 (1968).

Nor is there any substance in respondent's claim that this case is not "ripe for review" because the Board is planning to implement a "desegregation" plan in September, 1981. This is not a case where there is any ambiguity in a challenged statute which requires clarification in order to present this Court with a concrete and definitive controversy. Rescue Army v. Municipal Court, 331 U.S. 549, 575-78 (1947). The deference to state procedures urged by respondent should "only be made where the issue of state law is uncertain" -- and not otherwise. Harman v. Forssenius, 380 U.S. 528, 534-35 (1968), quoted in Lake Carriers' Ass'n v. MacMullen, 406 U.S. 498, 511 (1972). There is nothing in the Consent Decree, however, which creates any uncertainty as to the Board's past treatment of petitioners or the relief which petitioners are still seeking -- readmission to the schools, damages, and attorneys fees. Plainly, "[t]here is still a dispute, which is not 'blurred' or 'obliterated,' on which a

judgment will not be immaterial." Bell v. Wolfish, 441 U.S. 520, 550 n.31 (1979), distinguishing Sanks v. Georgia, 401 U.S. 144 (1971).

CONCLUSION

For all these reasons, respondent's Suggestion of Mootness should be rejected and this case should proceed on the merits.

Respectfully submitted,

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PROOF OF SERVICE

Pursuant to Rules 28 and 33 of the United States Supreme Court, I hereby certify that I served the requisite copies of the Opposition to Suggestion of Mootness on all the parties hereto by causing them to be delivered by mail to Thomas F. Gardner, Kirkland & Ellis, 200 East Randolph Drive, Chicago, Illinois this 10th day of October, 1980.

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